

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AMERICAN DIAGNOSTIC MEDICINE, INC.,

Civil No. 07cv2401 W (CAB)

Plaintiff,

V.

ROBERT WALDER, et al.,

Defendants.

**NOTICE AND ORDER FOR EARLY
NEUTRAL EVALUATION
CONFERENCE**

IT IS HEREBY ORDERED that an Early Neutral Evaluation of your case will be held on February 25, 2008, at 10:00 a.m. before United States Magistrate Judge Cathy Ann Bencivengo, United States Courthouse, 940 Front Street, Room 1131, San Diego, California.

The following are mandatory guidelines for the parties preparing for the Early Neutral Evaluation Conference.

1. **Purpose of Conference:** The purpose of the Early Neutral Evaluation Conference (“ENE”) is to permit an informal discussion between the attorneys, parties, and the settlement judge of every aspect of the lawsuit in an effort to achieve an early resolution of the case. All conference discussions will be informal, off the record, privileged and confidential. Counsel for any non-English speaking parties is responsible for arranging for the appearance of an interpreter at the conference.

2. Personal Appearance of Parties Is Required: All parties, adjusters for insured

1 defendants, and other representatives of a party having full and complete authority to enter into a
 2 binding settlement, and the principal attorneys responsible for the litigation, must be present in
 3 person and legally and factually prepared to discuss settlement of the case.¹

4 3. **Full Settlement Authority Required:** In addition to counsel who will try the
 5 case, a party or party representative with full settlement authority must be present for the
 6 conference. In the case of a corporate entity, an authorized representative of the corporation who
 7 is not retained outside counsel must be present and must have discretionary authority to commit
 8 the company to pay an amount up to the amount of the plaintiff's prayer (excluding punitive
 9 damage prayers). The purpose of this requirement is to have representatives present who can settle
 10 the case during the course of the conference without consulting a superior. Counsel for a
 11 government entity may be excused from this requirement so long as the government attorney who
 12 attends the ENE conference (1) has primary responsibility for handling the case; and (2) may
 13 negotiate settlement offers which the attorney is willing to recommend to the government official
 14 having ultimate settlement authority.

15 Unless there are **extraordinary circumstances**, persons required to attend the
 16 conference pursuant to this Order shall not be excused from personal attendance. Requests for
 17 excuse from attendance for extraordinary circumstances shall be made in writing at least 48 hours
 18 prior to the conference. Failure to appear at the ENE conference will be grounds for sanctions.

19 4. **Confidential ENE Statements Required:** No later than five court days prior to
 20 the ENE, the parties shall submit confidential statements of five pages or less directly to the
 21 chambers of Magistrate Judge Bencivengo outlining the nature of the case, the claims, and the
 22 defenses. These statements shall not be filed or served on opposing counsel.

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 25 ¹ "Full authority to settle" means that the individuals at the settlement conference must be authorized to
 26 fully explore settlement options and to agree at that time to any settlement terms acceptable to the parties.
Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989). The person needs to have
 27 "unfettered discretion and authority" to change the settlement position of a party. Pitman v. Brinker Intl., Inc., 216 F.R.D. 481, 485-486 (D. Ariz. 2003). The purpose of requiring a person with unlimited
 28 settlement authority to attend the conference includes that the person's view of the case may be altered
 during the face to face conference. Id. at 486. A limited or a sum certain of authority is not adequate.
Nick v. Morgan's Foods, Inc., 270 F.3d 590 (8th Cir. 2001).

1 5. **New Parties Must Be Notified by Plaintiff's Counsel:** Plaintiff's counsel
 2 shall give notice of the ENE to parties responding to the complaint after the date of this notice.

3 6. **Case Management Under the Amended Federal Rules:** In the event the case
 4 does not settle at the ENE, the parties can expect to leave the ENE with Rule 26 compliance dates
 5 or deadlines. Parties shall therefore be prepared to discuss the following matters at the conclusion
 6 of the ENE conference:

- 7 a. Any anticipated objections under Federal Rule of Civil Procedure
 26(a)(1)(E) to the initial disclosure provisions of Federal Rule of Civil
 Procedure 26(a)(1)(A-D);
- 8 b. The scheduling of the Federal Rule of Civil Procedure 26(f) conference
 within 24 days following the ENE;
- 9 c. The date of initial disclosure and the date for lodging the discovery plan
 within 14 days following the Rule 26(f) conference; and,
- 10 d. The scheduling of a Case Management Conference pursuant to Federal
 Rule of Civil Procedure 16(b) within 21 days following the Rule 26(f)
 conference.

11 The Court will issue an order following the ENE addressing these issues and setting dates as
 12 appropriate.

13 7. **Requests to Continue an ENE Conference:** Local Rule 16.1(c) requires that
 14 an ENE take place within 45 days of the filing of the first answer. Requests to continue ENEs are
 15 rarely granted. However, the Court will consider formal, written *ex parte* requests to continue an
 16 ENE conference when extraordinary circumstances exist that make a continuance appropriate. In
 17 and of itself, having to travel a long distance to appear in person is not "extraordinary." **Absent
 18 extraordinary circumstances, requests for continuances will not be considered unless
 19 submitted in writing no less than seven (7) days prior to the scheduled conference.**

20 Questions regarding this case or the mandatory guidelines set forth herein may be
 21 directed to Judge Bencivengo's law clerk at (619) 557-7688.

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1 A Notice of Right to Consent to Trial Before a United States Magistrate Judge is
2 attached for your information.

3 **IT IS SO ORDERED.**

4 DATED: January 16, 2008

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6 **CATHY ANN BENCIVENGO**
7 United States Magistrate Judge

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**NOTICE OF RIGHT TO CONSENT TO TRIAL
BEFORE A UNITED STATES MAGISTRATE JUDGE**

In accordance with the provisions of 28 U.S.C. § 636(c), you are hereby notified that a U.S. Magistrate Judge of this district may, upon the consent of all parties on form 1a (available in the clerk's office), conduct any or all proceedings, including a jury or non-jury trial, and order the entry of a final judgment. Counsel for the plaintiff shall be responsible for obtaining the consent of all parties, should they desire to consent.

You should be aware that your decision to consent or not to consent is entirely voluntary and should be communicated solely to the Clerk of Court. Only if all parties consent will the Judge or Magistrate Judge to whom the case has been assigned be informed of your decision.

Judgments of the U.S. Magistrate Judges are appealable only to the U.S. Court of Appeals in accordance with this statute and the Federal Rules of Appellate Procedure.